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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-454

C. J. PAUL DELOME,

Petitioner,

against

UNION BARGE LINE COMPANY, et al.,

Respondent,

against

PLATZER SHIPYARD, INC.,

Respondent.

APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF, *AMICUS CURIAE* PETITION AND BRIEF IN FAVOR OF PETITIONER

AMERICAN TRIAL LAWYERS ASSOCIATION

Admiralty Section
By: Paul S. Edelman

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New York, New York,
On Petition & Brief.
212—MU 7-8181

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Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION OF THE AMERICAN TRIAL LAWYERS ASSOCIATION FOR LEAVE TO INTERVENE AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

The American Trial Lawyers Association moves this Honorable Court for leave to file the attached brief as *Amicus Curiae* in support of the petition for a writ of certiorari in this case.

Consent has been sought from the parties here. Consent to file an *amicus curiae* brief has been given by counsel for the Petitioner, but counsel for Respondents have refused

consent. Accordingly, this motion is brought pursuant to Rule 42.

Members of the Admiralty Section of the Association include attorneys who represent the major number of injured longshoremen, maritime workers and crew members. In particular, these attorneys are directly concerned with the scope and effect of the admiralty jurisdiction, and the legal effects of accidents in drydocks and marine railways.

Since this case represents but one of many situations where a basic question of jurisdiction has been put in question, the Association feels constrained to petition this Court for leave to intervene as *amicus curiae*.

Respectfully submitted,

PAUL S. EDELMAN,
Counsel for the American
Trial Lawyers Association,
Admiralty Section.

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Respondent.

AMICUS CURIAE PETITION AND BRIEF IN FAVOR OF PETITIONER

American Trial Lawyers Association
Admiralty Section

Statement of Interest of the *Amicus Curiae*

The American Trial Lawyers Association, is a national bar association, consisting of more than 20,000 lawyers, primarily engaged in the practice of personal injury law. The Admiralty Section of this Association consists of a substantial number of attorneys and proctors who specialize in maritime personal injury law. These attorneys

represent members of the merchant marine and other maritime workers who are engaged in a hazardous industry and are recognized as having a special status both by legislation and generally in the courts of the land. All of these maritime workers have a real and direct interest in the outcome of the appeal.

Said Association is vitally concerned in the final outcome of this case involving as it does a situation which may finally resolve the tortuous series of cases which have attempted for over a generation to make a clear line by which attorneys and injured maritime workers will know their rights. It is a question of serious importance since 25% of all longshoremen's injuries occur on docks and piers. Only a broad interpretation of Maritime Jurisdiction will protect these men as Congress intended.

A resolution of the issues in this case will materially affect not only the financial plight of injured maritime workers, but is of paramount importance to thousands of workers, to the admiralty bar, and to the maritime industry generally. For the foregoing reasons it is respectfully prayed that this Honorable Court accept this brief *Amicus Curiae*.

PAUL S. EDELMAN,
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99 Park Avenue,
New York, New York 10016,
Former Chairman, Admiralty Sect.,
American Trial Lawyers Association.

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BRIEF OF THE AMERICAN TRIAL LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER

Questions Presented

1. Does the warranty of seaworthiness apply to a vessel undergoing minor repairs on a marine railway drydock. Does the warranty apply to a ship repairman performing "traditional duties of a seaman", but using modern equipment to effect the repairs.

2. Did the Court of Appeals exceed its powers in reversing the trial judge's findings that the injured man was performing the "traditional duties of a seaman".

3. Did the Court of Appeals err in holding that there was no admiralty jurisdiction for a negligent maritime

tort preceding the movement of a vessel on to a marine railway for repairs, although the injury occurred as a proximate result of the negligence when the vessel was on the marine railway.

Statement of the Case

Rather than repeat an extensive Statement, Amicus American Trial Lawyers Association will adopt petitioner's statement as it appears in his Petition for a Writ of Certiorari and in The Fndings of Fact of District Judge William Wayne Justice.

Suffice it to say, and for the most part, as recited in the opinion of Circuit Judge Dyer below, plaintiff was injured on a barge while it was on a marine railway. The walkways were 20 inches wide, the coamings 3 5/16 inches high and next to an open cargo hatch. On the port side there were brackets, bitts and a circular pumpwell cover at the walkway.

The minor repairs amounted to $3,688.76, lasting three days insofar as the vessel was on the marine railway.

Findings Included

1. There was no safe place to work for plaintiff because of construction defects existing when the vessel was brought to the repair facilities.

2. Plaintiff had nothing to hold on to at the open hatch area.

3. The passageway was not reasonably fit for its intended service.

The conclusions of law based on the facts as found were:

1. The walkway was unseaworthy and contributed to the injuries.

2. The hatch coaming was unseaworthy and contributed to the injuries.

3. The unseaworthy conditions pre-existed delivery to the repair yard.

4. The vessel was in navigation; plaintiff was performing the traditional duties of a seaman in making minor repairs.

5. The shipowner was negligent.

This Court is being called upon to re-assert admiralty jurisdiction over vessels including vessels on marine railways; to reassert the salutary protection of the unseaworthiness warranty to those doing the work of seamen of old in making minor repairs on a vessel; to reassert the doctrine that the use of modern methods and equipment does not relieve a vessel owner of its obligation to provide a seaworthy vessel and appurtences; and to reassert that the negligence of a shipowner while it has control is actionable although it causes an accident after it relinquishes "control" and that this negligence is a "maritime tort," giving admiralty jurisdiction.

To withdraw the protection of maritime law from a repairman undertaking minor repairs of a vessel is to deny a seaman a vital protection from the known heavy risks of maritime employment.

I. The Warranty of Seaworthiness Applies

A. A Vessel Undergoing Minor Repairs on a Marine Railway Is Within the Reach of the Warranty of Seaworthiness

It seems clearly established that a repairman making minor repairs to a ship at dockside undergoing an overhaul is protected by the warranty of seaworthiness.

Lawlor v. *Socony-Vacuum Oil Co., Inc.*, 275 F. 2d 599 (2nd Cir. 1960).

Navigable waters have traditionally been equated with dry docks, and dry docks have traditionally included marine railways which perform the same essential function.

The Court below accepted the fact that the barge here was in navigation undergoing minor repairs.

The Longshoremen's and Harbor Workers' Compensation Act of 1927, 44 Stat. 1424, 33 U.S.C., Sec. 901-950 in Section 903 provides coverage for "disability or death . . . from any injury occurring upon the navigable waters of the United States (including any dry dock) . . ."

In discussing the final wording of this Section 3 (i.e., Sec. 903 above), this Court in *Nacirema Operating Co., Inc.* v. *Johnson* (1969), 396 U.S. 212, at footnote 10 states:

"Drydocks were conceded to be within the admiralty jurisdiction in both the hearings and the debates, even though such structures are not always floating structures. See House Hearings, at 34; 68 Cong. Rec. 5403 (1927)."

The "drydock" jurisdictional requirement of the Act has been interpreted with the broadest liberality. Reason, as well as consistency dictate that "upon navigable waters" be sensibly interpreted as meaning just that particularly as here, to a ship. As Judge Hannaby said in *Port Houston Ironworks, Inc.* v. *Calbeck*, 227 F. Supp. 966 (S.D. Tex., 1964) in explaining his refusal to adopt the interpretation urged by the employer:

"The most recent authorities suggest a contrary conclusion. (Citations omitted.) The thrust of those cases is to obliterate nice distinctions constrictive of admiralty jurisdiction" (967).

The "drydock" decisions are plentiful. We wish, to call attention to *Holland* v. *Harrison Bros. Drydock and Ship*

Repair Yard, Inc., 306 F. 2d 269 (5th Cir., 1962), and these excerpts from the opinion of Judge Wisdom:

"Harrison Brothers counters that when a worker is injured with both feet planted on dry earth, there is no federal coverage regardless of whether he may be standing at the water's edge or near a dry dock" (370).

"It seems reasonable to us that any meaningful definition of marine railway should include the land immediately adjacent to the tracks 'that is beneath a ship drawn up on the railway and that must be used in the course of repairing any ship on the railway'. This argument draws strength from the fact that the general assignment Holland was performing was of a basically maritime nature" (372).

"In determining whether a worker's personal injury claim falls within the federal admiralty jurisdiction or the jurisdiction of the state, courts have regularly looked to both the locality of the accident and the nature of the work being performed. The literal language of the Longshoremen's Act seems to concern only the locality of the accident, but the history of the Act indicates that its underlying purpose was to embrace the admiralty jurisdiction whatever that might be." (Citations omitted.) (fn. 4, 372).

In *Avondale Marine Ways, Inc.* v. *Henderson,* (1953) 346 U.S. 366, the Supreme Court affirmed, per curiam, an award for fatal injuries sustained on a barge on a marine railway, 400 feet from the water. Courts have been particularly responsive to affording coverage under the Act to so-called "dry land" injuries. Cf. *Travelers Ins. Co.* v. *Branham,* 136 F. 2d 873 (4th Cir., 1943); *Travelers Ins. Co.* v. *McManigal,* 139 F. 2d 949 (4th Cir., 1944) and *Newport News S.B. & D.D. Co.* v. *O'Hearne,* 192 F. 2d 969 (4th Cir., 1951).

The equation of navigable waters with a drydock was also made in *Calbeck* v. *Travelers Ins. Co.* (1962) 370 U.S.

114 at 129 in discussing the *Avondale* Case. The Court there stated:

"Since a marine railway was considered to be a 'dry dock' the injury satisfied Sec. 3 (a)'s requirement that it occur 'upon, . . . navigable waters, defined in Sec. 3 as 'including any dock.' "

Furthermore, the equation of drydock and marine railway injuries with injuries aboard ship in water are consistent with the fact that vessel repair contracts are considered maritime claims, allowing a maritime lien.

New Bedford Dry Dock Co. v. *Purdy* (1922) 258 U.S. 96.

The Maritime Lien Act, 46 U.S.C., Sec. 971 et seq. (as amended, 1920) sets forth in part:

"Any person furnishing repairs, supplies, towage, use of dry dock or marine railway or other necessaries, to any vessel" . . . (when authorized) . . . "shall have a maritime lien on the vessel, which may be enforced by suit in rem . . ."

This Act specifically supersedes all state in rem statutes. 46 U.S.C., Sec. 975.

B. The Warranty Applies to Those Performing "Traditional Duties of a Seaman"

The repairs in question were minor in expense time, and scope. Since the trial judge so found, and accepted an expert witnesses' testimony that the repair was essentially similar to those made by seamen of old, the warranty should be upheld here.

Petitioner's brief recites the testimony elicited, and the facts clearly come within the doctrine of *Seas Shipping Co.* v. *Sieracki* (1946) 328 U.S. 85.

Lawlor v. *Socony-Vacuum Oil Co., Inc.*, 275 F. 2d 599 (2nd Cir. 1960).

Jackson v. *Lykes Bros. Steamship Co., Inc.* (1967) 386 U.S. 731.

C. The Use of Modern Equipment Does Not Foreclose Application of the Warranty

Sieracki also places great emphasis upon the fact that the warranty applies even where a shipowner has secured "the advantages of specialization of labor and skill brought about by modern divisions of labor."

The fact that heavy shoreside gear is used for ship repair, loading and unloading today cannot change the rule of law which arose from hazards of sailing ships long ago with their more limited mechanisms. Danger from new types of cranes, scoops and the like is just as menacing as traditional ship's gear.

In *Huff* v. *Matson Navigation Co.*, 338 F. 2d 205 (9th Cir. 1964), a longshoreman was hurt in the hold of a vessel by a scraper which was part of a stevedoring company's dockside crane used to unload bulk sugar. The Court held that this type of equipment, although new and novel could give rise to a claim for unseaworthiness in a well reasoned opinion.

Accord, Spann v. *Lauritzen*, 344 F. 2d 204 (3rd Cir. 1965).

II. The Court of Appeals Exceeded Its Powers in Reversing the District Court's Finding That the Petitioner Was Performing the "Traditional Duties of a Seaman"

The findings of the district judge that there were minor repairs was well reasoned and supported. He also found

that Petitioner was performing "traditional duties of a seaman" in undertaking a minor repair.

Findings are presumptively correct and are not set aside unless clearly erroneous.

"A finding is clearly erroneous when 'although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'"

McAllister v. *U.S.* (1954), 348 U.S. 19.

It is for the trial judge to draw different inferences or decide conflicting evidence.

Loc-Wood Boat and Motors, Inc. v. *Rockwell,* 245 F. 2d 306, 310 (8th Cir. 1957).

This is especially so with live witnesses.

See:

Spanos v. *The Lily,* 261 F. 2d 214, 215 (4th Cir. 1958).

The Court below would be inconsistent in not upholding the judge's ultimate findings, when the Court of Appeals itself stated that:

> "... it is clear that the UBL550 was a vessel in navigation undergoing minor repairs at the time of Delome's injury" (p. 15).

Many cases were cited below to show that the navigational status of a vessel ordinarily remains a question of fact, and that a ship entering a shipyard for minor repairs still is in navigation for purposes of applying the seaworthiness warranty.

III. Negligence of a Ship or Shipowner Causing Injury Is a Maritime Tort and Within the Admiralty Jurisdiction

Negligence as a maritime tort was recognized early as between a shipowner and non-employees.

In *Leathers* v. *Blessing* (1882), 105 U.S. 626 a business invitee was injured by a negligently stowed bale of cotton, and suit was upheld.

Over time the maritime rules of comparative negligence were applied to these invitee-negligence cases over the more limiting common law concepts.

The Max Morris (1890) 137 U.S. 1. (Longshoreman fell through unguarded opening in rail).

The development of negligence concepts as well as the application of unseaworthiness concepts for seamen is recorded at length in the *Sieracki* case.

As an ultimate statement of the maritime rule of negligence as a maritime tort, we have *Kermarec* v. *Compagnie Generale Transatlantique* (1959), 358 U.S. 625, which stated the rule that the shipowner owes a duty of due care to all those aboard ship "for the purposes not inimical to his legitimate interests . . ."

One of the most far-reaching cases involving a dry dock is *Ira S. Bushey & Sons, Inc.* v. *U.S.*, 398 F. 2d 167, 169 (2nd Cir. 1968).

There, a Coast Guard vessel was being overhauled in a dry dock, and an intoxicated Coast Guardsman opened valves that flooded tanks on one side of the dry dock causing the ship to fall off blocks and damage the dry dock wall. The Second Circuit Court of Appeals had no difficulty finding two admiralty statutes applicable, namely the Public Vessels Act and the Suits in Admiralty Act as revised in

1960. Under the 1960 revision, the latter act made the United States liable for damage arising from its vessels in the same manner as though the vessels "were privately owned or possessed, * * *" 46 U.S.C., Sec. 742. The Court stated that all maritime claims against U.S. vessels were thereby within the admiralty jurisdiction of federal courts, but the underlying assumption was that this would also be the case for all non-governmental vessels in a dry dock as well. Reference was made to S. Rep. 1894, 86th Cong. 2nd Sess., 2 U.S. Code Cong. and Adm. News, P. 3583 *et seq.*

If admiralty jurisdiction arises for the negligence of a crew member of a vessel in dry dock, surely the jurisdiction lies for negligence in construction and maintenance of the vessel itself, and its appurtenances.

Under *Albanese* v. *N.V. Nederl. Amerik. Stoomv. Maats* (1965), 382 U.S. 283, a shipowner could be held liable for constructive knowledge of noxious fumes in the hold.

If the shipowner is clearly liable for negligence as a general proposition, he is liable for his negligence in allowing a continuing dangerous condition to exist beginning prior to his placing the ship in the hands of a repair yard.

Van Horn v. *Gulf Atlantic Towing Corp.*, 388 F. 2d 636 (4th Cir. 1968).

(a barge owner would be liable for injury to a shipyard employee injured by grain residue left on deck when the vessel was delivered to the dry dock, on a negligence theory).

In *White* v. *U.S.*, 400 F. 2d 74 (4th Cir. 1968), a repair worker could recover in negligence if oil on his clothes came from an unsafe oily condition created while the owner was still in control.

These latter two cases are restrictive and unsound on their development concerning the unseaworthiness rule,

but they are clearly right in expressing the negligence rule.

As developed in Point 1, a marine railway is traditionally within the maritime and admiralty jurisdiction; the same rules as to navigable waters apply to marine railways and dry docks.

If the impact of a shipowner's negligence occurs on a marine railway, this is a "maritime tort", within the admiralty jurisdiction.

This is demonstrated by:

1. The history of the Longshoremen's Act, Sec. 903 set forth in the *Nacirema* case.

2. The long line of dry-dock and marine railway cases allowing application of the Longshoremen's Act, and confirmed by *Calbeck*.

3. The traditional rule and the Maritime Lien Act allowing a maritime lien for ship repairs.

Therefore, any colorable claim of negligence within the maritime jurisdiction of the Court allows a suit in admiralty, particularly since the ship itself is liable for its torts, in rem.

In *Romero* v. *International Terminal Operating Co.* (1959), 358 U.S. 354, the fundamentals of the federal admiralty jurisdiction are discussed.

Our Constitution made three grants of maritime jurisdiction.

1. Congress was authorized to confer admiralty jurisdiction in federal courts inferior to the Supreme Court.

2. The federal courts were to draw on the "inherent" substantive law of the admiralty and maritime

jurisdiction, and to continue its development within Constitutional limits, and

3. Congress was empowered to "revise and supplement" maritime law.

Romero also held, germane here, that a "substantial claim" that a foreign crew member came within the Jones Act, would confer Civil jurisdiction to a federal court, and that other non-statutory claims against other parties gave "pendent" Civil jurisdiction.

By clear analogy, a colorable claim of negligence and maritime tort would confer admiralty jurisdiction.

Admiralty jurisdiction clearly does not require an injury on navigable water in the strictest sense.

As stated in a leading Jones Act case where the injury was suffered on land, but in conjunction with a vessel:

". . . the admiralty jurisdiction over the suit depends not on the place where the injury is inflicted but on the nature of the service and its relationship to the operation of the vessel plying in navigable waters."

O'Donnell v. *Great Lakes Dredge & Dock Co.* (1943), 318 U.S. 36, 42-43 (and interstate commerce need not be invoked).

Where a *vessel* is involved, the vessel itself is an offender and gives rise to an admiralty claim.

"The proceeding *in rem* which is within the exclusive jurisdiction of admiralty is one essentially against the vessel itself as the debtor or offending thing,—in which the vessel is itself 'seized and impleaded as the defendant and is judged and sentenced accordingingly'. By virtue of dominion over the thing all persons interested in it are deemed parties to the suit; the decree binds all the world, and under it the property itself passes and not merely the title or interest of a personal defendant."

Rounds v. *Cloverport Foundry & Machine Co.* (1915), 237 U.S. 303, 306.

Can anyone doubt that a suit here against the vessel as the offender, *in rem*, would lie?

After all, what is more within the admiralty jurisdiction than a vessel whose fault is alleged, and especially a vessel in dry dock or on a marine railway, traditionally as maritime as navigable waters?

The Court below is wrong under *Romero* in restricting civil jurisdiction in this case. It is more in error in denying a jurisdiction in admiralty when a maritime tort for negligence is alleged.

Amicus therefore respectfully request this Honorable Court to grant certiorari on this case involving a large area of maritime concern and workmen. Furthermore, there are basic uncertainties when an appellate court can find a vessel undergoing minor repairs to be in navigation, and then deny admiralty jurisdiction for a pre-existing negligent condition, and to deny the applicability of the protective doctrine of unseaworthiness.

This Court in its Constitutional power to "revise and supplement" maritime law can determine both matters of doctrine and jurisdiction so as to give the protection to seamen that has historically been the guideline for judicial action.

Respectfully submitted,

PAUL S. EDELMAN,
Admiralty Section,
American Trial Lawyers Assn.

Certificate

This is to certify that on the 9th day of November, 1971, copies of the within brief *Amicus Curiae* were served by mail on Ned Johnson, 320 College, Beaumont, Texas, counsel to Petitioner; Wayne Patterson, 2300 Memorial Blvd., Pt. Arthur, Texas, 77640, counsel to petitioner; Rienstra, Rienstra & Dowell, 707 Beaumont Savings Building, Beaumont, Texas 77701, attorneys for respondent Union Barge Line Co.; and Mehaffy, Weber, Keith & Gonsoulin, 1400 San Jacinto Building, Beaumont, Texas 77701, attorneys for respondent-third-party defendant-Platzer Shipyard, Inc.

PAUL S. EDELMAN.